

CANADA / JUDGMENT

R. v. Edgar

2025 BCSC 2223

COURT

Supreme Court of British Columbia

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2025 BCSC 2223 R. v. Edgar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Edgar,

2025 BCSC 2223

Date: 20251110

Docket:44987-2

Registry: Duncan

Rex

v.

Michael Randall Edgar

Before: The Honourable Justice Morley

Reasons for Judgment

(Air of Reality of Self-Defence, Defence-of-Property)

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Counsel for the Accused:

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Place and Date of Hearing:

Duncan, B.C.

July 23, 2025

Place and Date of Judgment:

Duncan, B.C.

November 10, 2025

Overview

- [1] Some acts that would otherwise be crimes are excused if they are done in defence of property.
- [2] Like much of our law, this principle was inherited from England. An important example was that a person could use gentle force to expel a trespasser from their home or business, even though this would otherwise be an assault. Property certainly could not be defended at all costs: if the acts were not reasonable, then they would still be crimes. But the common law recognized that people could not be expected to retreat from their own homes and some acts that would otherwise be illegal would be justified by the need to remove the unwelcome.
- [3] When Canada codified its criminal law in 1892, these principles were set out in provisions that were sometimes criticized for being legalistic and wordy. But they were doubtless put into practice in Canadian communities large and small. Traditionally (i.e., up until 2011), this defence applied equally if the trespasser was someone who was in the premises uninvited (whether in the truly frightening context of home invasion or the more mundane context of someone "crashing" a party or a nightclub) or if the trespasser was someone originally uninvited but then asked to leave (whether because they were a belligerent houseguest or a drunken patron). Occupiers of premises, or those acting under their authority, could not do whatever they wanted to respond. But they could do things that would otherwise be crimes. According to the Supreme Court of Canada, this could, in certain circumstances, include using a weapon: *R .v. McKay*, 2007 SCC 16 at para. 2.
- [4] The most significant legal question before me in this case is whether the Citizen's Arrest and Self-defence Act, S.C. 2012 c. 9 [the "Self-defence Act"], which enacted what is now ss. 34 and 35 of the Criminal Code, changed this. Did it, as the Crown argues, remove any defence when the person against whom the allegedly criminal act was committed was originally invited and refused to leave? Or, as the defence submits, does s. 35 continue to apply, regardless of how that person came to be a trespasser?

- [5] The Crown argument is plausible because the operational language in s. 35(1)(b)(ii) requires the accused to believe, on reasonable grounds, that another person "is about to enter, is entering or has entered the property without being entitled by law to do so". The Crown says that if the person was entitled by law to enter, then the defence no longer operates. If the person is trespassing because they refuse to leave after being asked to do so, then anything that would be an assault (or other crime) would continue to be.
- [6] This is a strong argument, based on the ordinary grammatical meaning of both the French and English text. But for the reasons that follow, I follow the three provincial court judges who have looked at this issue since the current language was enacted, and have decided that defence of property under s. 35 of the Criminal Code includes defence against a person who refuses to leave, and not just someone who never had a right to be on the property in the first place.

Procedural Background

- [7] This issue, and others more specific to the case, arose in tragic circumstances.
- [8] I needed to decide the issue when Michael Edgar was being tried, before a jury, for "unlawful act" manslaughter, arising out of the death of his brother, Matthew Edgar, Jr., on March 26, 2022. (Because there are a number of individuals, including the accused, the deceased, and one of two Crown eyewitnesses, with the last name "Edgar", I will refer to everyone whose last name is Edgar by their first names without intending any disrespect.)
- [9] Section 222(5)(a) of the Code makes it culpable homicide to cause the death of human being "by means of an unlawful act". When such homicide is not murder, it is manslaughter: s. 234. The Crown must prove, beyond a reasonable doubt, both the elements of the "unlawful act" as well as the additional elements of the objectively foreseeable risk of bodily harm which is neither trivial nor transitory and that the unlawful act in fact caused death.
- [10] In this case, the evidence shows that Michael armed himself with a kitchen knife during an argument/fight with his brother, Matthew. Tragically, Matthew was accidentally impaled by the knife during the course of the fight, and died from massive internal bleeding. There was no suggestion that Michael intended this to happen: on the contrary, he was immediately remorseful and tried to save his brother's life, but it was too late. The Crown's argument was that Michael's act of arming himself with a kitchen knife was an "unlawful act", namely possession of a weapon for a "purpose dangerous to the public peace" contrary to s. 88(1) of the Code.
- [11] At the charge conference, the defence asked that I put the following defences to the jury, as negating criminal liability for Michael's act of arming himself with a knife:
- a) section 34 of the Criminal Code, commonly referred to as "self-defence", and
 - b) section 35 of the Criminal Code, commonly referred to as "defence of property".

- [12] The Crown opposed putting either defence to the jury.
- [13] I held, with reasons to follow, that both defences had an air of reality, and therefore that they should be put to the jury. In the event, the jury found Michael Edgar "not guilty".
- [14] I am publishing an edited version of the reasons because of the broader significance of the s. 35 issue, which appears not to have been considered by a superior court in Canada since the current language was enacted in 2011. In the remainder of these reasons, I will employ the present or future tense, to refer to the time of trial, from the perspective of the time of the ruling.

The Evidence

- [15] The principal evidence that could give rise to an air of reality to these defences came from the two Crown lay witnesses, Margaret August and Ryan Edgar. Both of them were present for the fight and both observed Matthew's death.

Margaret August's Testimony

- [16] Ms. August was a friend of Matthew's from high school. She visited Matthew and Michael, and their cousin Ryan, on March 25 and 26, 2022 at the Ditidaht First Nation reserve, where Michael and Ryan lived, and where Matthew was staying with Michael.
- [17] Ms. August testified to a significant consumption of alcohol and socialization by the four the evening of March 25, into the next morning and next day.
- [18] On March 26, when the sun was out, Ms. August recalls drinking with Michael and one of his uncles on Michael's porch. Ryan and Matthew were inside. Michael seemed calm and happy at this point. Ms. August went inside the trailer.
- [19] About five minutes later, Michael came inside, his mood totally changed. According to Ms. August, Michael started telling Matthew he had to leave Michael's house. Michael was upset and his voice was raised. As Ms. August recalls it, Michael did not tell Matthew why he was no longer welcome, even after Matthew asked. She testified that Michael got close to Matthew's face, inside his "bubble".
- [20] She said that after Michael told Matthew to leave a few times, Michael started pushing his brother. She testified that Michael escalated to punching and then Matthew started pushing back. According to Ms. August, after Matthew made a comment about Michael's girlfriend, Michael went into the kitchen and grabbed a knife. She recalled Michael holding the knife up to Matthew's neck and telling him to go.
- [21] Ryan tried breaking up the fight by pulling Michael away from Matthew. Ms. August testified that she and Ryan got the knife away from Michael. Ms. August took the knife to the kitchen and put it on the counter near the sink. Ms. August remained in the kitchen for the rest of the fight.

- [22] Ms. August testified that Matthew tried to leave and grabbed his remaining drinks. However, Matthew did not leave. She testified she did not know if Michael tried to prevent him from leaving.
- [23] Michael and Matthew ended up wrestling on the couch and then on the floor. Ms. August reports that Michael was on top of Matthew. He had another knife. Ms. August did not know where he got it. The fight ended when Matthew "got stabbed" by the knife in Michael's hand.
- [24] At no time was Matthew armed during this fight. On this, obviously significant, point, Ms. August's evidence is confirmed by Ryan's.
- [25] Given the nature of the "air of reality" test, I will not comment on Ms. August's cross-examination, except to note that she agreed that her perception at the time would have been influenced by alcohol, and to a number of factors a jury might consider affected the reliability of her memory, including a desire to forget this extremely traumatic event and an intervening period of significant substance use. Several prior inconsistent statements were put to her, but she did not adopt any of them on any point of significance.

Ryan Edgar's Testimony

- [26] Ryan Edgar was the other eyewitness. He is the first cousin of Michael Edgar and Matthew Edgar. He is 29 years old now, 26 at the time of Matthew's death. He has always lived on the Ditidaht First Nation reserve. He has known both Michael and Matthew his whole life.
- [27] He gave a description of the community. There are roughly 200 people in it. It takes about five minutes to walk across town. In addition to homes, there is a community school and a health clinic. Youbou and Port Alberni are the nearest communities. A number of relatives of Matthew, Ryan and Michael live in the community, including Matthew Edgar, Sr., Matthew and Michael's father. Most of their extended family live there.
- [28] On March 25, 2022, Ryan, Matthew and Michael went in Michael's car to Port Alberni. Michael drove. They spent an hour or two in Port Alberni. They picked up Ms. August and then went to a liquor store. Ryan largely confirmed Ms. August's account of the evening, although he had a more detailed recall of where they visited.
- [29] At some point, presumably on March 26, 2022, Michael, Ryan and Ms. August ended up back at Michael's home. Matthew, who had not been part of the group for a period of time, returned sometime later. Ryan fell asleep on the couch in the living room.
- [30] When Ms. August woke Ryan up, Michael and Matthew were shouting at each other. Michael was telling Matthew to "get the fuck out of my house." He said this multiple times. Matthew would not leave the house. Ryan's testimony was that Matthew was staying at Michael's house for the week.

- [31] Ryan got between the brothers. He tried to persuade Matthew to leave so Michael could calm down. Matthew did not want to leave. Michael pushed Ryan out of the way into the kitchen area. The push was hard enough to leave a bruise.
- [32] As Ryan recalled it, Matthew began shoving and then Michael escalated to punching. Matthew was insulting Michael.
- [33] Michael grabbed a knife from near the kitchen sink. Ryan's description of the knife was as a paring knife with a blade about 4 inches long. Ryan then tried to get the knife from Michael while getting Matthew to leave. Ryan grabbed Michael's arm and was able to get the knife away from him. After Ryan got the knife from Michael and passed it to Ms. August, he turned to Matthew and tried to get him to leave. Matthew continued to refuse to go. Ryan's back was to Michael at this point.
- [34] A few seconds later, Ryan became aware that Michael had another knife. He did not know where it came from or see Michael pick it up. Michael was still yelling at Matthew to get out. Matthew ended up pushing Ryan aside. The brothers started wrestling. They went from the front door into the living room towards the couch. Michael was on top of Matthew on the couch. Matthew pushed upwards on Michael and Michael fell on the floor with the knife in his left hand. As he was falling, he grabbed his brother, who was pulled off the couch by Michael's momentum.
- [35] Tragically, Matthew then fell onto the knife, which stabbed into his chest/stomach.
- [36] Ryan was unable to see the knife or the wound but could see blood. He recalled Matthew laying down on his back and took out the knife. Matthew said, "I am scared". Ryan then ran to call 911. He ran to a neighbour's house, Brian Joseph's, and made the call to the 911 operator. Ryan did not go back in the trailer. He went to Michael's driveway.
- [37] Ryan's testimony was that he was intoxicated and that Michael was similarly intoxicated. All of the group were staggering. From his past experience, he would say Michael was more drunk than usual. He was unable to say how intoxicated Matthew was.
- [38] In cross-examination, Ryan confirmed that Matthew had a nickname of "Hercules" or "Herc". Matthew was a little shorter than Michael, but a lot heavier. Matthew "worked on his strength" and was muscular. Ryan did not know whether he lifted weights, but agreed Matthew was a "strong guy".
- [39] After having his memory refreshed by seeing a police statement he gave, Ryan agreed that Matthew was annoyed because Ryan and Michael were telling "in jokes" and generally getting along well, which may have annoyed Matthew. He recalled Matthew telling them to "shut up".
- [40] Ryan confirmed that Matthew and Michael's father, Matthew Edgar, Sr. lives at Ditidaht nearby. He said Matthew and Michael's brother, Brandon, lives there as well, but not by himself.

- [41] Ryan confirmed that he heard Michael yell at Matthew, "Get the fuck out of my house". Michael repeated this message a number of times. Ryan confirmed that Matthew refused to leave. Michael, Ms. August and Ryan were all trying to persuade Matthew to get out, at least temporarily.
- [42] In direct, Ryan did not recall Michael saying anything about Matthew beating up their uncle. However, after reviewing his police statement, he remembered Michael saying "That's our fucking uncle. How could you do that to him?" Ryan did not know which uncle Michael was talking about.
- [43] Ryan agreed that things happened quickly between when he was trying to get Matthew to leave and when he saw Michael with the first knife.
- [44] Ryan agreed that Matthew was trying to egg Michael on to fight him and said to Michael that he "ain't shit". Ryan remembered Matthew saying he was going to hurt Michael. Ryan was not completely sure, but "pretty sure" Matthew threw the first punch and that he did this before Michael got the first knife. He said he "thinks" one of Matthew's punches struck Michael in the head.
- [45] Ryan described how Michael used the knife. He said Michael held it at about hip height at a 90-degree angle with the blade pointing away from Matthew. According to Ryan, Michael did not say he was going to use the knife but told Matthew to get out of the house. Matthew continued to refuse to leave.
- [46] Ryan said he was able to take the knife from Michael without wrestling him and give it to Ms. August.
- [47] According to Ryan, Michael held the second knife in his left hand. He held it at his side with the blade pointing away from Matthew. Ryan's testimony was that Matthew never gestured or pointed the knife towards his brother and never said he would use it. According to Ryan, when Michael had the knife, he fought with his right hand, not his left.
- [48] In cross-examination, Ryan testified that the brothers were wrestling near the couch, grabbing on to each other. Matthew fell on top of Michael and onto the knife. Ryan agreed with the statement by Michael's lawyer that the knife "happened to be pointing up" and he agreed it was an accident.
- [49] Ryan's testimony was that when this happened, Michael was immediately hysterical. Ryan's testimony was that he saw Michael pull the knife out of Matthew's body and put pressure on the wound. Ryan saw Michael try to give Matthew CPR. Michael was yelling, "Don't go", that he didn't "mean to", and that he was sorry. As he was yelling, he was also crying and seemed to be panicking. Michael told Ryan and Ms. August to get a car.

Other Evidence

- [50] An admission establishes that Iona Jack-Dennis is the common law partner of Scott Dennis. Mr. Dennis is Michael and Matthew's uncle. Ms. Jack-Dennis alleges that she and Mr. Dennis were assaulted by Wayne Tate and Matthew Edgar, Jr. earlier on March 26, 2022. Mr. Dennis was transported by ambulance to Cowichan District Hospital. Ms. Jack-Dennis did not tell Michael about the assault, but, in my view, a reasonable jury could infer that he found out about it by the time he made the comment to Matthew about doing something to their uncle and that this was why he told Matthew to leave the house.

The Test For "Air of Reality"

- [51] The test judges in jury trials should apply in determining whether a defence should go to the jury is "whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit": *R. v. Cinous*, 2002 SCC 29 at para. 49.
- [52] In other words, I should ask whether there is an "air of reality" to self-defence (s. 34 of the Code) and/or defence of property (s. 35).
- [53] With respect to direct evidence, the application of this test is fairly straightforward. The trial judge takes the evidence the accused relies on -- in this case Ryan Edgar's evidence -- and assumes it to be credible and reliable. If, applying the substantive law correctly, the jury could use such evidence to find that the defence is made out, or that there is a reasonable doubt as to whether the defence is made out, the defence must be put to the jury: *Cinous* at para. 88. The judge does not weigh the direct evidence, since that is the function of the jury.
- [54] With respect to circumstantial evidence or if there is an "objective reasonableness" component to the defence -- as is the case with both self-defence and defence of property -- the judge's task is "somewhat more complicated": *Cinous* at para. 89. The judge must not substitute his or her own views of what would be reasonable inferences or what would be reasonable conduct for those of the jury but must nonetheless engage in what McLachlin C.J.C. characterized as "limited weighing" in *R. v. Arcuri*, 2001 SCC 54.
- [55] "Limited weighing" means the judge must consider the circumstantial evidence and the evidence that goes to objective reasonableness tests to determine whether it is "reasonably capable of supporting the inferences [the accused would ask] the jury to draw": *Arcuri* at para. 23, as adopted in *Cinous* at para. 90.
- [56] Thus, if there is a combination of direct evidence, however credible or reliable, and circumstantial evidence or evidence that goes to an objective reasonableness test that is reasonably capable of sustaining the defence, the defence must go to the jury. If not, the defence has no "air of reality" and it should not go to the jury.

Self-Defence

- [57] The three elements of self-defence are set out in s. 34(1) of the Code, and further interpreted in *R. v. Khill*, 2021 SCC 37:
- a) The accused must have a reasonable belief that force is being used or threatened against him.
 - b) The otherwise-criminal act (in this case possession of a knife for a purpose dangerous to the public peace, which is the foundation for unlawful act manslaughter) must have had as its purpose defending or protecting the accused from the force he reasonably believed was being used or threatened against him.
 - c) The otherwise-criminal act must be reasonable in the circumstances as the accused knew or reasonably believed them to be.
- [58] If, for each element, the accused can show either direct evidence which, if believed, would at least give rise to a reasonable doubt with respect to that element or circumstantial evidence that is reasonably capable of supporting inferences the accused would want the jury to draw, then the defence must go to the jury.
- [59] The Crown does not dispute that on either Ms. August's or Ryan Edgar's evidence, Matthew was using force against Michael and it would hardly be much of an inference that Michael had a reasonable belief that this was so.
- [60] The Crown does dispute that there is an evidentiary foundation for the second element, namely whether Michael's purpose was to defend or protect himself from force he reasonably believed Matthew was using or threatening to use against him.
- [61] Focusing on Ryan's testimony, since it is more favourable for Michael in this respect, counsel for the Crown says that it does not permit an inference that Michael was at any time during the fight "scared" of Matthew. The Crown notes that Ryan did not view the start of the dispute, since he was asleep. It says, on a limited weighing, I could reject the possibility that a reasonable jury could come to the inference that Michael's purpose in possessing the knife would be to defend or protect himself from Matthew.
- [62] I disagree. Since the alleged unlawful act is Michael arming himself with a knife, the most important point is that Ryan observed that, and was able to observe enough for the jury to make inferences about Michael's purposes. Showing fear is not the same as having a defensive purpose, and there is no obligation on the defence to provide evidence that Michael showed fear.
- [63] Ryan provided testimony, which the jury could believe, that Matthew initiated physical contact and was the first to punch, and that this occurred before Michael obtained the first knife. He also provided testimony from which a jury could infer that Michael had just learned Matthew had violently assaulted their uncle. Ryan testified, at least in cross-examination, that Matthew threatened that he would hurt Michael and was egging him on to a fight. Ryan's version of how Michael used both knives could reasonably support an

inference that Michael's subjective purpose was defensive.

- [64] Naturally, I am not saying that the jury will make that inference about Michael's purpose in arming himself with a knife. I am merely saying they could do so. In my view, I would be overstepping my role as judge not to permit them to weigh the evidence in this respect.
- [65] The third element, namely whether Michael's actions in arming himself were "reasonable in the circumstances" is quintessentially a jury question. On a limited weighing, I conclude a reasonable jury could find Michael arming himself to be "reasonable in the circumstances".
- [66] The Code sets out a number of factors that go to this determination at s. 34(2).
- [67] With respect to s. 34(2)(a) ("nature of the force or threat"), Ryan's testimony was that Matthew was larger and stronger. The evidence of Ms. Jack-Dennis could support an inference that Matthew was capable of seriously hurting someone, both physically and in terms of what he was willing to do.
- [68] With respect to s. 34(2)(b) (imminence of threat and availability of other means), any threat from Matthew was clearly imminent. There was evidence that these events occurred on a reserve to which police assistance could not be expected to come in a timely way.
- [69] With respect to s. 34(2)(e) (size, age, gender and physical characteristics), the evidence was that Matthew was larger and stronger than Michael.
- [70] Obviously, the jury will have to grapple with the fact that there may have been alternatives in the form of seeking assistance from relatives, Michael's own role in the incident (s. 34(2)(c)), and the obviously important fact that only Michael used a knife in the course of the fight (s. 34(2)(d)). They will ultimately have to consider whether Michael's act of arming himself was proportionate to whatever threat they find Matthew posed (s. 34(2)(g)).
- [71] I will provide instructions on these points and draw the jury's attention to the evidence and the test. However, I would be usurping the jury's role if I make a determination of reasonableness. On the limited weighing I am permitted under Cinous, I conclude there is an "air of reality" to self-defence under s. 34 of the Code.

Defence of Property

- [72] With respect to defence of property, the Crown's principal argument is not about the sufficiency of the evidence, but whether, property interpreted, s. 35(1) of the Code applies to the situation Michael and Matthew were in at all.
- [73] In English, s. 35(1) states in relevant part:

A person is not guilty of an offence if

- (a) they [...] believe on reasonable grounds that they are in peaceable possession of property [...];

- (b) they believe on reasonable grounds that another person
- (i) is about to enter, is entering or has entered the property without being entitled in law to do so, or

[...]

- (c) the act that constitutes the offence is committed for the purpose of
- (i) preventing the other person from entering the property, or removing that person from the property, or

[...]

- (d) the act committed is reasonable in the circumstances.

[Emphasis added]

[74] The French version of the operational language is as follows:

N'est pas coupable d'une infraction la personne qui, à la fois: []

- b) croit, pour des motifs raisonnables, qu'une autre personne, selon le cas:
- (i) sans en avoir légalement le droit, est sur le point ou est en train d'entrer dans ou sur ce bien ou y est entrée,

[75] The Crown concedes that Michael was in peaceable possession of his home, and that the jury could reasonably infer from the evidence that he armed himself with the knife to remove Matthew from the property, so ss. 35(1)(a) and (c) are made out.

[76] While the Crown makes a similar argument to that under s. 34 that there is no "air of reality" to the act being "reasonable in the circumstances", as required by s. 35(1)(d), its principal argument relates to s. 35(1)(b), which enumerates the grounds that a person must have for s. 35 to apply. I will address its argument that there is no air of reality to s. 35(1)(d) briefly at the end of these reasons.

[77] So what is the argument about s. 35(1)(b)(i)? Could Michael have had reasonable grounds to believe Matthew was "about to enter, [was] entering or [had] entered the property without being entitled in law to do so"?

[78] By definition, a guest, like Matthew (an "invitee" in the jargon of the common law) is allowed to be on property because the owner or renter ("occupier") has allowed ("licensed") them to do so. But their presence on the premises is conditional. As a result, if the occupier tells them to leave and gives them a reasonable opportunity to do so (including, if applicable, retrieving their personal effects), they have to go. If they refuse, they are trespassing. At that point, they no longer are entitled in law to remain on the property. This is basic property/tort law and of course it is equally basic common sense. That is what it means to be a guest.

- [79] This is the reason that someone who is being rowdy in a bar has to leave when the management tells them to go. It is also why people have a right to ask guests to leave their home, and they have to do so.
- [80] Prior to 2011, the implications for the criminal law were clear. An occupier, or someone operating under their authority, could use reasonable force to get someone out of their home or business establishment in these circumstances. At common law and under the statutory predecessors to s. 35, whatever defence existed to use justifiable force when someone was trying to barge in uninvited would apply in precisely the same way to someone refusing to leave when appropriately asked to: see Todd Kathol, "Defence of Property in the Criminal Code", 35 Crim. L.Q. 453 (1993) (canvassing the criminal law as it existed before 2011).
- [81] For example, according to Sir James Stephen, in the English common law, a party in lawful possession of premises was justified in "gently laying hands on the trespasser and requesting him to depart", which would otherwise be a battery: Kathol at p. 456. The criminal law, in this case, turned on the private law of trespass. The example Stephen invoked was of use of force when a trespasser refused to leave. Of course, the trespasser could either be someone who was never invited or someone whose invitation had been revoked.
- [82] The Criminal Code, especially as it was originally enacted, largely tried to set down the English common law of crime in writing. So it is not surprising that s. 41 of the Code, as it was prior to 2011, provided that a person in peaceable possession "is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom", provided "he uses no more force than is necessary." The issue was whether someone was a "trespasser", not whether they became a trespasser by entering uninvited or by wearing out their welcome.
- [83] However, in 2011, the current wording for s. 35 was enacted. The drafters chose to avoid the word "trespass", with all its legal baggage, and instead substitutes the word "entry". Section 35(1)(b)(i) now requires that the accused believe, on reasonable grounds, two things about another person:
- a) The other person, at the time of the act or omission that would otherwise be an offence, "is about to enter, is entering or has entered the property" (the physical predicate), and
 - b) That person is not "entitled by law to do so" (the legal predicate).
- [84] The question that Michael Edgar's prosecution raises is whether an accused has to have a reasonable belief that both the legal predicate are met at the same time as the alleged offence, or if it is sufficient that the legal predicate is met at that time. If the former interpretation is correct, then s. 35 does not apply to acts taken to remove guests who refuse to leave. That is because when the guest entered the property they were entitled to do so, and at the time force is being applied or threatened they were not "entering" or "about to enter".

- [85] I agree with the Crown that the ordinary, grammatical way of using the phrase "has entered the property without being entitled to do so" would imply "without being entitled to do so" at the time. "To do so" is an "anaphoric" phrase: it refers back to a previous verb phrase much like a pronoun (usually) harkens back to a previous noun phrase. As an anaphora, the action the person is, in this case, not entitled by law to do, would normally take on the same attributes of time and manner as the verb phrase it refers to: see Dorothy L. Grover et al., "A Prosentential Theory of Truth" (1975) 27 Philosophical Studies 73 ("to do so" is a proverb in the same way "it" is a pronoun).
- [86] If the phrase "to do so" is anaphoric, then the physical predicate could be substituted into it. In other words, in a case like this one where the "other person" has entered, the legal predicate would seem to be that that person was not "entitled to have entered". This is a different thing than not being entitled to remain. As a pure question of textual exegesis, it would seem that if Parliament had meant to catch the situation of an invitee whose invitation is revoked, it would have said "is about to enter, is entering, has entered or remains on the property without being entitled by law to do so." The phrase "or remains on" (or some equivalent) is conspicuous by its absence.
- [87] Since the Code is federal legislation, I should consider the equally authoritative French version. At the grammatical level, it also supports the idea that the legal predicate must exist at the same time as the physical predicate. The operative language is a belief, on reasonable grounds, that the other person <<sans en avoir légalement le droit, est sur le point ou est en train d'entrer dans ou sur ce bien ou y est entrée>>. The use of the passé composé tense and of the action verb "entrer" in the phrase <<y est entrée>> emphasizes a discrete act of entry as the moment at which having the legal right is to be judged. And the chapeau of s. 35(1), by including the phrase <<à la fois>> seems to emphasize the simultaneity of the state of having entered and not having the legal right to do so.
- [88] An alternative reading would require interpreting "without being entitled by law to do so" as referring to the act of being on the property, not the act of entry. But because the act of being on the property is not itself a verb phrase in the earlier part of the sentence, this is a strained reading as a matter of ordinary English syntax, since it does not respect the "proverbial" nature of "to do so". It also fails to explain the use, in the French, of a verb and verb form emphasizing a discrete act.
- [89] The Crown argues that this was a deliberate policy choice by Parliament not to include the situation of a guest whose permission to be on the premises is revoked.
- [90] The Self-defence Act, introduced by the government as Bill C-26, was the legislation creating what is currently ss. 34 and 35 of the Code. It broadened the defence of property, with the only substantive limitation on what could be done for the purpose of protecting property being that it must be "reasonable in the circumstances". As the Supreme Court of Canada pointed out in relation to the reform of self-defence, but which could be applied with equal force to the reform of defence of property, the Self-defence Act "not only expanded the

offences and situations to which [the defence] could apply, but also afforded an unprecedented degree of flexibility for the trier of fact": Khill at para. 3. The Crown argues that in light of this expansion of the offences to which s. 35 would apply and the high level of flexibility for the trier of fact, Parliament wanted to avoid extending this expansion to the situation where an occupier revokes an invitation, and confines it to invasion, taking, damage and destruction of property.

- [91] However, as a matter of first principle, there is something odd about the position the Crown wants the court to adopt. There is no reason to think that trespassing in the form of refusing to leave when asked to do so will always and everywhere be less threatening than entry without permission at all, and neither the rest of the law nor common sense treat them as fundamentally different. A drunken and belligerent house guest refusing to leave seems like a larger problem than someone taking a short cut at the back of a large, rural property. Why would Parliament leave to a jury the appropriateness of a response to the latter, but not permit any response to the former?
- [92] Moreover, the Crown's policy argument cannot explain why there is no statutory defence, even applying a different standard, in what is, after all, a very common fact situation, surely one that occurs somewhere in Canada almost every night. Is there really no longer a statutory defence from the crime of assault for a bouncer in a nightclub who uses minimal force to eject a rowdy patron? Has every one of those unconsented-to touchings been a crime?
- [93] No reported superior court case decides whether s. 35 of the Code extends to acts of removing guests whose permission to be on premises has been revoked. However, this has been considered by three reported cases in provincial courts across the country. All three found that there is no legal difference between acts committed to remove an invitee who will not leave and acts committed to remove someone who entered the property without permission in the first place: *R. v. Jacobson*, 2015 BCPC 291; *R. v. Fleming*, 2014 ONCJ 26; *R. v. Cormier*, 2016 ABPC 159.
- [94] Of these, Cormier has the most thorough analysis. In that case, the accused alleged he only used reasonable force against the complainant, his former girlfriend, because she refused to leave his apartment. The judge held this defence was legally available, although he rejected the accused's testimony on the facts and found that he actually engaged in domestic violence.
- [95] At paras. 92 and 93, the learned provincial court judge posed the problem as follows:
- [92] Prior to the enactment of s. 35 the previous s. 41 made it clear that a person in peaceable possession of real property or their agents could eject trespassers who were originally invitees. [...]

- [93] A difficulty arises for a situation where an invitee who becomes a trespasser is being ejected. The main problem comes about because of paragraph (b) of s. 35(1). The only applicable alternative that might apply to the trespasser is subparagraph (i). That subparagraph allows a person to act when they believe on reasonable grounds that the person is "about to enter, entering, or has entered" the property without legal right to do so. Certainly it is clear that a trespasser can be barred from entering or attempting to enter without lawful authority. Clearly, the phrase "has entered" can apply to those who are discovered after their entry. In my view, the phrase can [be] used to cover the situation where a person enters initially with explicit or implied permission but becomes a trespasser. Admittedly, the text is not as clear as it might be on this point.
- [96] At paras. 97 and 98, the judge considered the legislative history and concluded that it was not consistent with a literal reading:
- [97] According to the Justice Canada Guide, the stated purpose of the new amendments was to simplify the existing law. Further, according to that document Parliament meant to extract the common core of the previous defences.
- [98] In my view, it is difficult to believe that Parliament's intention was to reform the law of defence of property such that property owners or their agents could not remove individuals who were originally invitees, but had become unruly trespassers. This right was well entrenched in the common law prior to the enactment of any Code provision.
- [97] I agree with the judge in Cormier both that there is ambiguity created by the text, but also that the better view is that a person who has entered the property is "not entitled to do so" if they lose the entitlement later on, even though they had the entitlement when they first entered. While this may not be a natural reading of the language as a purely textual matter, it is supported by the history of trespass law, and, more significantly, by the purpose of Parliament in enacting the section.
- [98] As a general principle, statutory interpretation is not just about text. It is about inferring the intention of Parliament from text, context and purpose: *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15 at para. 30, referring to *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21.
- [99] To be sure, there are dangers in a court substituting its own view of what would best fulfill the purpose that could be attributed to Parliament or a legislature at the expense of the solution that body in fact chose. Statutory interpretation is centered on the intent of the legislature at the time of enactment and courts are bound to give effect to that intent. Courts must be careful not to "exceed their institutional role" by engaging in political questions raised by changes subsequent to enactment, which are better addressed by legislatures: *Telus* at para. 32. But that does not mean that courts cannot apply statutes to new or evolving circumstances: indeed, they must do so where the legislature has used broad or open-textured language to encompass circumstances they may not themselves be able to anticipate: *Telus* at para. 33.

- [100] The key is to recognize that the text, context and purpose are always those of the enacting legislature, not the judge interpreting them. Context is not grounds for ignoring what is said nor is purpose a basis for considering free-standing policy arguments. But both are absolutely essential to get at what Parliament or a legislature actually meant.
- [101] Since this is a criminal law case, I must consider the principle statutory interpretation that where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation: *R. v. McIntosh*, 1995 CanLII 124 (SCC), [1995] 1 SCR 686 at para. 29. In *McIntosh*, the Supreme Court of Canada rejected the Crown's argument that the pre-2011 self-defence provisions of the Code were necessarily unavailable to "initial aggressors":
- [I]f real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. *Marcotte v. Deputy Attorney General for Canada*, 1974 CanLII 1 (SCC), [1976] 1 S.C.R. 108, Dickson J., at p. 115.
- [102] Thus, whether interpreting a provision creating criminal liability, or one limiting it by providing a defence, the principle of "strict construction" gives the benefit of the interpretative doubt to the accused.
- [103] I note that in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 28, the Supreme Court of Canada stated that this principle of strict construction of penal liability, viewed as a canon of statutory construction, only applies if there is an ambiguity that arises after text, context and purpose have all been considered. Since such an ambiguity is relatively rare, viewed in the strict sense of being such a "canon", the principle of strict construction of penal liability may have less relevance in the era of the "modern approach" to statutory interpretation.
- [104] However, it is also possible to view this "canon" as really exemplifying something that is always part of the context and purpose of criminal law, and thus not to be relegated to a "tie breaker" after the tools of the "modern approach" have been exhausted.
- [105] It is part of the context of a provision of the Code that it is setting out substantive criminal law. And the point of substantive criminal law is to delimit, from all the sphere of human activity, egregious conduct worthy of denunciation and punishment. Normally, at least, this is conduct that is condemned by almost all of society. It is thus part of the context of the substantive criminal law that (a) criminal liability is an exception to the general presumption that people are free to act without fear of criminal sanction, and (b) those exceptions will generally track what the community views as condemnable behaviour: Michael Plaxton, "The Presumption of Restraint and Implicit Law" (2020), 64 McGill L.R. 467.

- [106] Similarly, it can be seen as part of the purpose of the Code to set out substantive criminal law liability explicitly, so that those subject to it will have notice of what is subject to punishment. That was part of why Canada codified what had previously been common law back in 1892. It follows that it is part of the purpose of statutory defences to protect conduct that would not normally be thought to come within the scope of what is condemnable, by reason of the special circumstances set out in the defence.
- [107] Viewed this way, the background assumption that conduct not clearly labelled as criminal is presumptively not criminal, especially if it would not widely be viewed as worthy of denunciation, is not something added on to the "text, context and purpose" analysis characteristic of the modern approach, but is part of precisely that approach. So is the corollary that defences should not be read narrowly, especially not to permit the punishment of behaviour that would ordinarily be viewed as acceptable, and especially not based on arbitrary distinctions.
- [108] Taking this generic context and purpose of the Code into account in the exercise of statutory construction is entirely consistent with Bell ExpressVu's skepticism about putting too great a weight on "canons of construction" that cut against figuring out what Parliament meant based on the text, context and purpose of the actual statute.
- [109] Moreover, if we look at the specific context and purpose of the Self-defence Act, these strongly support the conclusion that defence of property includes defence against those originally invited on to the property who now refuse to leave.
- [110] A central part of the context of any statute is the law as it was before the statute was enacted. This history was set out in *R. v. McKay*, 2006 MBCA 83 at para. 14. In *McKay*, the Manitoba Court of Appeal substituted a conviction for an acquittal by a trial judge based on the pre-2011 defence of property provisions. On appeal to the Supreme Court of Canada, both the acquittal and conviction were vacated, and a new trial was ordered. In brief oral reasons the Supreme Court of Canada distanced itself from the proposition that a weapon could never be used against a trespasser: *R. v. McKay*, 2007 SCC 16.
- [111] As the Manitoba Court of Appeal noted, the pre-2011 provisions reflected the common law and there was little substantive change in these provisions from when the Code was first enacted in 1892 to the time of the *McKay* decision.
- [112] Of direct relevance here, the common law made no distinction among trespassers based on whether the trespass was because the entry was factually unauthorized at the time of entry or arose because an invitee refused to leave later.
- [113] Indeed, the common law used the legal fiction of "trespass ab initio" to render entry legally, albeit not factually, unauthorized from the outset if the authority under which the entry originally occurred was abused by a positive act: *Berschied v. Ensign*, 1999 CanLII 6494 (BCSC) at para. 64. In other words, the common law created a "legal fiction" by which an otherwise-authorized entry was retroactively deemed to be unauthorized as a result of

subsequent acts: *Six Carpenters' Case* (1610), 4 Co. Rep. 432, 77 E.R. 695; *Fuoco Estate v. Kamloops (City)*, 2001 BCCA 325 at para. 10.

- [114] I would not suggest that it is a good idea to import these old legal fictions -- which solved legal problems it would take significant historical research to understand -- into the interpretation of a provision enacted a decade and a half ago. But when the drafters substituted the apparently-less-legalistic word "entry" for "trespass", they did not, and could not, get away from all the old law about when such entry is "authorized". Through the sometimes mind-bending logic of retroactivity, that law held that sometimes a person who has already entered was "not entitled to do so", even though the reason for not being entitled to do so occurred later. That is part of the context of the statute today. It at minimum creates ambiguity since traditional legal understandings of temporality come into conflict with those that an ordinary English or French reader would employ.
- [115] Since a narrow reading of a defence expands criminal liability, this is not an occasion to prefer strict interpretations over remedial ones.
- [116] To be sure, the fact that the law was a certain way before the existing provision was enacted is not necessarily an argument that it continues to be that way. It could be that the purpose was to change the law.
- [117] I take the caution that real statutes have multiple purposes, sometimes in tension with each other, and which can be stated at different levels of abstraction, and that the court's role is to be a faithful agent of the legislature in a choice on how to reconcile all of them: Frank Easterbrook, "Statutes' Domains" (1983) 50:2 U. Chicago. L. Rev. 533; Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022), 59 Alta. L. Rev. 920 at p. 921.
- [118] However, taking this caution into account, I do not think the Crown's interpretation would be faithful to any of the objectives that the Citizen's Arrest and Self-defence Act was seeking to fulfil.
- [119] In his February 7, 2012 testimony before the House of Commons Standing Committee on Justice and Human Rights, the then-Minister of Justice, the Honourable Rob Nicholson identified the objective of the defence of property provisions of the Self-defence Act as being to replace the existing provisions with a "simplified" defence:

For decades criminal practitioners, the Canadian Bar Association, the Supreme Court of Canada, academics, and many others have criticized the law of self-defence primarily, but also the law of defence of property, as being written in an unnecessarily complex and confusing way.

The complexity of the law is not without serious consequence. It can lead to charging decisions that fail to take into account the merits of the defences in particular situations. It can confuse juries, and it can give rise to unnecessary grounds of appeal, which cost the justice system valuable time and resources. The law should be clear and clearly understood by the public, the police, prosecutors, and the court.

- [120] In March 2013, the Department of Justice put out a "Technical Guide for Practitioners" on the Self-defence Act. It states that "Parliament's primary intent was to simplify the legislative text that sets out the defences": Technical Guide, p. 1. It claimed that the "public was not served by a legislative text which even judges had difficulty understanding and explaining".
- [121] If the purpose of the Self-defence Act was to simplify the law, and permit the trier of fact to determine what was "reasonable" based on common sense and experience, then it would be odd to find that it created new arbitrary lines between different kinds of trespass.
- [122] And, indeed, there is no suggestion, either in the Minister's testimony in committee, or in the introduction of the Bill in the House, or in the Department of Justice's Technical Guide, that Bill C-26 was intended to prevent occupiers of residential or business premises from using moderate and reasonable force so that an invitee who had overstayed their welcome -- possibly as a result of belligerent activity -- would leave. On the contrary, the Technical Guide indicated that there was no intent to change the "application of the defences [of self-defence or defence of property] in actual cases:

Despite the problems with the wording of the law, there had been relatively few concerns about the application of the defences in actual cases. Parliament's intention in reforming the defences was to enact defences that express the fundamental principles that animate the laws of self-defence and defence of property so that the law itself corresponds to the approach taken by juries in deciding these cases. To achieve this objective, the new defences extract from the old provisions the common core elements of each defence, and codify those core elements in a single simple framework that is capable of assessing a defence claim in any situation.

Technical Guide, pp. 1-2. Emphasis in the original.

- [123] Specifically with respect to defence of property, the Technical Guide stated, "In developing the new law, great care was taken to ensure that the same degree of authority to defend property under the old law was maintained under the new law": Technical Guide, p. 12.
- [124] The detailed discussion of the text of s. 35(1)(b) in the Technical Guide contains no suggestion that the language of s. 35(1)(b)(i) was more restrictive than the previous language of "trespass". On the contrary, it stated, "The new law provides one single defence applicable regardless of the nature of the property interference": Technical Guide, p. 32.
- [125] But removing a defence, especially to assault, in the context of an invitee who refuses to leave private premises would in fact be a major shift in the substantive law. As a practical matter, proprietors of establishments open to the public need to be able to ask patrons to

leave and, especially where alcohol or other intoxicants are involved, need to be allowed to use reasonable and proportionate force if someone will not leave. The same is true for guests in personal homes. It would go against the thrust of the legislation to say that the only option in that circumstance would be for the occupier themselves to leave.

- [126] If Parliament decided to treat these situations differently, then of course, in the absence of a constitutional challenge, it could do so. It would be my job to respect that, regardless of whether I agree or disagree. But I see no evidence that it in fact made such a choice. Rather, it was trying to simplify the law, not substantively change it. Parliament seems to have focused on "entry", rather than "trespass" as a way of making the wording plainer and more understandable by a jury. These efforts to simplify the law should be interpreted without thereby sacrificing the principle, found both in the common law and in common sense morality, that a guest who belligerently refuses to leave business premises, let alone their host's home, can, at minimum, be gently escorted out without fear of criminal liability.
- [127] Naturally, guests are entitled to a reasonable amount of time to go before force is used and are entitled to take their belongings with them. Moreover, any force or suggestion of force must be "reasonable". It is a long-standing principle of the common law, which I think is not displaced by s. 35, that lethal or disabling force cannot be used to protect property, as opposed to persons. I am prepared to make that instruction to the jury. But I note that in McKay, the Supreme Court of Canada unanimously refused to rule out the use of a weapon in defending a person's property right in their home.
- [128] On the facts here what is at issue is whether Michael could arm himself with a knife when Matthew refused to leave his home, despite being told to leave. Whether those actions were reasonable in this respect will depend on what evidence the jury accepts and its judgment of those actions. That would be consistent with the objective of the Self-defence Act, as stated by the Minister introducing it and the Department of Justice of the time, of simplifying the law and leaving difficult judgment calls to the common sense of the jury.
- [129] Having disposed of the interpretative question raised by the language of s. 35(1)(b)(i), I must consider whether the evidence gives rise to an air of reality to the defence as a whole, including to whether Michael's act of arming himself with a kitchen knife was "reasonable in the circumstances. In my view, this should be decided by the jury. Khill makes it very clear that what is reasonable is a nuanced question of fact to be ordinarily left to the trier of fact, in this case the jury. I would be defying that injunction if I did not put that defence to them.
- [130] I will therefore include references to both ss. 34 and 35 of the Code in my final instructions to the jury. I will provide a draft of those instructions to counsel for comment before giving them.

"J. G. Morley, J."

The Honourable Justice Morley

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